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In the Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN INSURANCE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that 12 U.S.C. 94 required the transfer of petitioner's third-party claim against the United States, based on the actions of the Federal Deposit Insurance Corporation as receiver of Penn Square Bank, to the federal district court in Oklahoma handling the Penn Square receivership.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B9) is reported at 877 F.2d 590. The opinion of the district court (Pet. App. A1-A11) is reported at 692 F. Supp. 866.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1989. A petition for rehearing was denied on July 25, 1989 (Pet. App. C1). The petition for a writ of certiorari was filed on October 23, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984, the Federal Deposit Insurance Corporation (FDIC) took over the assets of Continental Illinois National

Bank (Continental), thereby acquiring Continental's right to collect on fidelity bonds covering employee misconduct issued by five insurance companies. In 1987, the FDIC filed suit in the United States District Court for the Northern District of Illinois against all five companies, including petitioner, claiming they were liable for losses sustained by Continental as a result of the dishonest and fraudulent acts of a Continental officer, John R. Lytle. The FDIC alleged that Lytle, in exchange for kickbacks and gratuities, caused Continental to purchase loan participations from Penn Square Bank of Oklahoma (Penn Square) in violation of sound banking practices.[1] The FDIC also sought punitive damages against petitioner for providing financial assistance to Lytle in connection with his defense of federal criminal charges arising from this matter. Pet. App. B1-B2.

Petitioner filed a third-party complaint under the Federal Tort Claims Act (FTCA) against the United States, alleging that the FDIC, as receiver for Penn Square, tortiously mismanaged Penn Square's loan portfolio, thereby magnifying Continental's losses. Petitioner claimed it should not be required to pay the FDIC, as insurer of Continental's losses (FDIC-Corporate), more than the loss Continental would have borne if the FDIC, as receiver for Penn Square (FDIC-Receiver), had maximized the value of the assets securing those loans.[2] The government moved to dismiss

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[1] A loan participation agreement is an agreement between one or more lenders to fund some or all of a commitment to a borrower in exchange for a proportionate share of the interest and principal payments.

[2] The courts have recognized that the FDIC may act in two separate capacities: (1) in a corporate capacity as an insurer of bank deposits; and (2) in a receivership capacity as receiver of insolvent banks. See *Trigo* v. *FDIC*, 847 F.2d 1499, 1502-1503 & nn. 3 & 4 (11th Cir. 1988); *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 366-367, 373 (7th Cir.), cert. denied, 444 U.S. 829 (1979).

or transfer the third-party complaint on the ground, among others, that venue lies exclusively in Oklahoma, the location of the Penn Square receivership, under 12 U.S.C. 94.[3] Pet. App. B1-B2.

2. The district court denied the government's motion and, *sua sponte*, certified its order for immediate appeal under 28 U.S.C. 1292(b). The court agreed with the government that Section 94 was "both mandatory and exclusive" and "controls over the more general [FTCA] venue provision."[4] Pet. App. A9-A10 (citing *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976)). Nevertheless, the court rejected the government's argument that Section 94 required dismissal, because, in the court's view, Section 94 does not apply to third-party actions and the balance of convenience did not favor venue in Oklahoma. Pet. App. A1-A11.

3. The court of appeals reversed and remanded with instructions to transfer petitioner's FTCA claim to the district court in Oklahoma under 28 U.S.C. 1406(a). Pet. App. B9. The court noted that the FTCA is the exclusive tort remedy against the government; hence, petitioner had correctly named the United States as the defendant in its tort complaint. *Id.* at B3. The court then held that the venue provisions of 12 U.S.C. 94 controlled petitioner's claim against the United States because the claim was based on actions

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[3] Section 94 (12 U.S.C.) provides:

> Any action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver of such association, shall be brought in the district or territorial court of the United States held within the district in which that association's principal place of business is located * * *.

[4] An FTCA action may be brought "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. 1402(b).

of the FDIC as receiver. Pet. App. B5. Section 94, the court noted, governs venue in any action "against the [FDIC] as receiver of [a defunct banking] association." Construing Section 94 in light of its purposes and functions, the court reasoned that that provision should be read to apply to petitioner's tort claim. Pet. App. B6-B8.

The court reasoned that any distinction between the FDIC as receiver and the United States is a "highly formal" one; the question whether Section 94's venue restriction applied to petitioner's claim should therefore turn on the purposes of that provision. Pet. App. B5. The court took note of Congress's recent amendment of Section 94 in which Congress repealed the special venue restrictions in suits against national banks generally, but specifically retained them for suits involving national bank receiverships.[5] The court concluded from this that Congress intended to centralize the winding-up of failed banks in order to consolidate the receivership in one court, thereby "conserving both judicial resources and the assets of the estate." Pet. App. B6. The court also pointed out that Section 94 was amended shortly after the collapse of Penn Square and has been used repeatedly in Penn Square-related cases; as a result, one district judge in Oklahoma has acquired great familiarity with Penn Square's affairs and the actions of FDIC-Receiver.[6] *Ibid.*

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[5] See 12 U.S.C. 94 (1976), repealed by Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 406, 96 Stat. 1512-1513. See also Act of Jan. 12, 1983, Pub. L. No. 97-457, § 20(a), 96 Stat. 2509. The rationale for the original statute (enacted in 1864) was " 'to prevent interruption in the [banks'] business that might result from their books being sent to distant counties' " in obedience to process from state courts, a rationale which the court of appeals noted had been rendered largely irrelevant. Pet. App. B6 (quoting *First National Bank of Charlotte* v. *Morgan*, 132 U.S. 141, 145 (1889).

[6] The court cited *National Union Fire Ins. Co.* v. *Continental Illinois Corp.*, 640 F. Supp. 182, 184 (N.D. Ill. 1986); *In re Continental Securities Litigation*, No. 82-C-4712 (N.D. Ill. Oct. 21, 1985); and *In*

Against that background, the court concluded that the treatment of FDIC-Receiver and the United States as two separate parties would frustrate "the central administration of the failed bank's estate" as well as "quick, consistent decision-making." Pet. App. B7. The court also explained that since the United States may be the proper defendant in a contract claim under the Tucker Act (see 28 U.S.C. 1346(a)(2)) arising out of the conduct of FDIC-Receiver, "[i]f suits about the conduct of FDIC-Receiver but naming the 'United States' fall outside § 94 for that reason, not much would be left of § 94." Pet. App. B7. The court declined to construe Section 94 in a way that would deprive it of any meaningful scope. Pet. App. B7.

The court also rejected petitioner's contention that its claim was entitled to an exception from Section 94 because it was brought as a third-party action. Pet. App. B7-B8. The court first observed, in disagreement with the district court, that the balance of convenience favored transfer to Oklahoma. The court explained that the Oklahoma district court is conversant with the Penn Square receivership, and that the issues in the FDIC's complaint in the present case are unrelated to petitioner's claim that FDIC-Receiver violated its duties to Penn Square's creditors. More fundamentally, the court reasoned, Section 94 is designed to protect the convenience of the defendant, not that of a claimant. Noting that former 12 U.S.C. 94 was held to prevail over the more general venue statute of the federal securities laws in *Radzanower* v. *Touche Ross & Co.*, *supra*, the court determined that neither the doctrine of " 'ancillary

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re Longhorn Securities Litigation, 573 F. Supp. 274 (W.D. Okla. 1983), and noted that one legislator had remarked, in floor debate on the bill that amended former Section 94, "Why is this legislation badly needed? That can be summed up in three words – Penn Square Bank." 128 Cong. Rec. 27,346 (1982) (remarks of Rep. Lott).

venue' in third-party actions" nor petitioner's inconvenience in litigating in two courts justified disregarding the venue restrictions of Section 94. Pet. App. B8-B9.

Judge Ripple dissented on the basis that the government had "declined to argue whether the FDIC-Receiver, rather than the United States, is the proper defendant in the third-party action" and thus "permission to bring this discretionary appeal * * * was improvidently granted." Pet. App. B9.

ARGUMENT

Petitioner challenges the court of appeals' holding that venue for its FTCA claim was properly laid in Oklahoma rather than Illinois.

1. Petitioner first contends (Pet 10-11) that the court of appeals erred in applying 12 U.S.C. 94 to actions against the United States that are based on alleged torts by the FDIC in its capacity as receiver of a failed bank. In petitioner's view, Section 94 governs only those cases that rest on the conduct of the bank before appointment of the FDIC as receiver. That contention does not warrant this Court's review. To begin with, as petitioner concedes (Pet. 9), the court's application of Section 94 to petitioner's FTCA claim was a question "of first impression"; there are no other court of appeals decisions addressing the issue, let alone a conflict that might call for this Court's resolution.

In addition, the decision below is correct. First, contrary to petitioner's contention (Pet. 12, 15), the language of the statute supports the decision below. Section 94 controls actions "against the [FDIC] as receiver of" a national bank; the court of appeals explained the reasons for applying this language to a tort suit against the United States that is predicated on the actions of the FDIC "as receiver." Pet. App. B6-B7. Compare *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364 (7th Cir.), cert. denied, 444 U.S. 829 (1979).

Petitioner's proposed distinction between actions seeking to recover from the failed bank's assets and actions against the United States for alleged torts by FDIC-Receiver has no basis in the language of the statute.[7]

In support of its construction of Section 94, petitioner asserts (Pet. 15) that any recovery must come from the United States Treasury and not the Penn Square assets. There are, however, three possible sources of funds for payment of a judgment (if any) in this case—the Treasury's judgment fund, the FDIC's insurance fund, and the Penn Square estate. It is not clear, at this early stage, which is the appropriate fund.[8] Regardless of the answer to that

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[7] Petitioner relies on *Foxgord* v. *Hischemoeller*, 820 F.2d 1030, 1035 (9th Cir.), cert. denied, 484 U.S. 986 (1987), for the general proposition that (Pet. 13) "where a statute names parties who come within its provisions, other unnamed parties are presumed * * * excluded." We agree with that proposition as a general matter. Compare *Finley* v. *United States*, 109 S. Ct. 2003, 2008 (1989) (FTCA jurisdictional provision authorizing suits " 'against the United States' means against the United States and no one else."). Neither that principle nor *Foxgord*, however, are inconsistent with the court of appeals' holding. *Foxgord* defined the scope of statutory and constitutional provisions governing suits against "consuls" to give effect to the intended purposes of those provisions. The court of appeals did the same in defining the scope of Section 94 to fulfill Congress's purpose of consolidating actions involving FDIC receiverships in the receivership court.

[8] Petitioner correctly notes that FTCA judgments are generally paid out of the judgment fund of the U.S. Treasury. See 28 U.S.C. 1346(b), 2414; 31 U.S.C. 1304(a). However, the governing statute authorizes payment only "when * * * payment is not otherwise provided for." 31 U.S.C. 1304(a)(1). The Comptroller General has taken the position that "payment is 'otherwise provided for' if some appropriation or fund under control of the agency involved is available to pay the judgment in question." *The Honorable Strom Thurmond, United States Senate*, No. B-224653 (Comp. Gen. Dec. 18, 1986); *In re Southside Investment Co.*, No. B-211389 (Comp. Gen. July 23, 1984). See also *In re S.S. Silberblatt, Inc.*, 62 Comp. Gen. 12, 14 (1982). Putting to one side

question—which the court of appeals did not decide (Pet. App. B7)—permitting actions in multiple courts prevents "quick, consistent decision-making" and threatens to deplete "the assets of the estate, which could dwindle as FDIC-Receiver retained law firms across the country to educate many district judges about the status of a single bank." *Id.* at B6-B7.

Second, the legislative history also supports the court of appeals' decision. Congress amended Section 94 in 1982 to repeal its venue limitations for national banks generally, but specifically retained those restrictions for actions involving FDIC receiverships. This suggests, as the court of appeals reasoned, that Congress intended to "centralize[ ] the winding-up of banks" with "[o]ne court * * * ~~or will~~ oversee[ing] the receivership, conserving both judicial resources and the assets of the estate * * *." Pet. App. B6; see also *In re Continental Securities Litigation*, No. 82-C-4712 (N.D. Ill. Oct. 21, 1985). Congress's passage of this legislation directly on the heels of the Penn Square collapse further supports this analysis. Pet. App. B6.

Finally, the purposes underlying Section 94 support the court of appeals' holding. If the "United States" is not entitled to avail itself of the venue limitation contained in Section 94 when sued for matters arising out of the FDIC's conduct of the Penn Square receivership, the practical effect will be to force FDIC-Receiver to defend itself in multiple fora. That would undermine one of the central rationales of the exclusive venue provision for actions against the FDIC as a receiver of a failed bank: to prevent interference

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whether these rulings would be sufficient to subject the FDIC's insurance fund to payment of any judgment in this case, the FDIC statute also provides for payment of "expenses of [an FDIC] receivership" out of the receivership estate. 12 U.S.C. 197, 1822(a). Hence, it is not clear what source of funds would be available for payment of a judgment (if any) in this case.

with the receivership through fragmented, burdensome, and expensive litigation.[9]

2. Petitioner next contends (Pet. 16-18), citing *Davis & Cox* v. *Summa Corp.*, 751 F.2d 1507 (9th Cir. 1985), and *Haile* v. *Henderson National Bank*, 657 F.2d 816 (6th Cir. 1981), cert. denied, 455 U.S. 949 (1982), that the courts of appeals are in conflict over "whether Section 94 supersedes the right to assert third-party actions provided by Rule 14(a) of the Federal Rules of Civil Procedure." That argument is without merit.

In *Davis & Cox* v. *Summa Corp.*, *supra*, the court relied on former Section 94 to *dismiss* a third-party complaint (filed by the plaintiff in response to the defendant's counterclaim) against a national bank. 751 F.2d at 1527. The court's holding is entirely consistent with the present case, which also dismissed a third-party action. The court's observations in *Davis & Cox* (*id.* at 1527 n.9) about whether an exception to former Section 94 existed when a defendant brings a third-party action against a national bank were dicta.

In *Haile* v. *Henderson National Bank*, *supra*, a federal equity receiver sought an order in ancillary proceedings directing an out-of-state bank to turn over property to it. The court rejected the bank's principal contention that a due process "minimum contacts" analysis applied to such claims. 657 F.2d at 822-824. In passing, the court also rejected the bank's argument that venue was improper under

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[9] Petitioner's strained reliance on a hypothetical automobile accident case involving FDIC-Receiver is unavailing since, as petitioner concedes, its claims in this case are "closely related to the affairs of the [Penn Square] bank." Pet. 11-12. The application of 12 U.S.C. 94 to cases where its purposes are directly implicated does not depend on whether its coverage might be unnecessary in other settings.

former Section 94, reasoning that "where jurisdiction is ancillary, the post-jurisdictional consideration of venue is ancillary as well." 657 F.2d. at 822 n.6. Unlike petitioner's claim, *Haile* did not involve a routine third-party complaint under Fed. R. Civ. P. 14; rather, the case involved a federal equity receivership engaged in the process of marshalling assets. More fundamentally, *Haile* applied former Section 94, which was supported by a different rationale than the current version of that provision.[10] There is no indication that courts will mechanically extend decisions applying the former provision to the amended statute.[11]

Finally, petitioner contends (Pet. 18-20) that the balance of convenience in this case favors venue in Illinois. Petitioner's factbound arguments about the "duplicative" nature of discovery in this case, a claimed "overlap" in the issues in Illinois, and the "substantial burden" it will face in litigating in Oklahoma do not merit this Court attention. At all events, given the Oklahoma district court's extensive familiarity with the Penn Square receivership, the court of appeals reasonably concluded that "[j]udicial resources will be conserved" if petitioner's claim were heard in Oklahoma. Pet. App. B8.

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[10] The former provision applied to any suit against a national bank and was designed to avoid the inconvenience and disruption of removing banking records to distant locations. See *Radzanower* v. *Touche Ross & Co.*, 426 U.S. at 156. As the court of appeals recognized in this case, that purpose has been rendered largely irrelevant by "[p]hotocopiers, computers, fax machines, and air travel." Pet. App. B6.

[11] All of the remaining cases cited by petitioner (Pet. 18) are district court decisions; any conflict among those decisions does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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